Supreme Court, U. S.
FILED
FEB 13 1980
JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-253

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,

v.

JERRICO, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

WILLIAM E. ANDERSON
CURTIS L. WILSON
Of Counsel
Jerrico, Inc.
101 Jerrico Drive
Lexington, KY 40503

THOMAS W. POWER
ROBERT D. McDONALD
Attorneys for Appellee
1919 Pennsylvania Avenue, NW
Suite 504
Washington, D.C. 20006
Telephone (202) 659-9061

DI CESARE · Printing — 331-8101 — Washington, D.C. 20006

INDEX PAGE

QUESTIONS PRESENTED 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3
SUPPLEMENTAL STATEMENT 5
SUMMARY OF ARGUMENT 10

ARGUMENT

I. REVERSAL OF THE DISTRICT COURT'S DECISION WOULD SET A DANGEROUS PRECEDENT FOR THE FEDERAL SYSTEM 14

A. Section 16(e) Violates The Due Process Clause Of The Fifth Amendment In That It Creates The Appearance Of Bias, The Potential For Bias And Actual Bias 16

B. The Interest Of Assessing Officials In Section 16(e) Penalty Funds Is Increased Because That Section's Procedure Circumvents The Normal Budgetary Process And Precludes Congressional Oversight And Control Of The Use Of Such Funds 22

II. THE POTENTIAL FOR BIAS IN SECTION 16(e) PENALTY PROCEEDINGS IS SUBSTANTIAL 27

III. THE DOCTRINE OF DISQUALIFICATION FOR INTEREST WAS CORRECTLY APPLIED BY THE COURT BELOW TO THE ADMINISTRATIVE PROCESS AT ISSUE BELOW TO THE ADMINISTRATIVE PROCESS ISSUE 40

A. The Discretionary Authority Of The Assistant Regional Administrator, When Coupled With The Pecuniary Interest Created By Section 16(e), Violates The Standards Of Due Process 41

B. Description Of The Review By The Administrative Law Judge As *De Novo* Is Inaccurate 46

C. Appearance Of Bias And Potential For Bias Exists At The Administrative Law Judge Level 50

IV. SEVERANCE OF THE REIMBURSEMENT PROVISION OF SECTION 16(e) IS NOT APPROPRIATE 52

CONCLUSION 57

TABLE OF CITATIONS

CASES: PAGE

American Casualty Co. v. *Fyler,* 60 Conn. 448 42

Aptheker v. *United States,* 378 U.S. 500 21

Buckley v. *Valeo,* 424 U.S. 1 53

California Bankers' Association v. *Shultz,* 416 U.S. 21 21

Champlin Refining Company v. *Corporation Comm'n,* 286 U.S. 210 52

City Council v. *Pepper,* 1 Richardson (S.C.) 364 ..... 38, 39

Commonwealth Coatings Corporation v. *Continental Casualty Company,* 393 U.S. 145, *rehearing denied,* 393 U.S. 1112 ..... 39, 40

Dandridge v. *Williams,* 397 U.S. 471 21

Dugan v. *Ohio,* 277 U.S. 61 ..... 31, 34, 35

Fusari v. *Steinberg,* 419 U.S. 379, *rehearing denied* 420 U.S. 955 22

Gardner v. *California,* 393 U.S. 367 41

Gibson v. *Berryhill,* 411 U.S. 564 52

Haggar Co. v. *Helvering,* 308 U.S. 389 56

Hassett v. *Welch,* 303 U.S. 303 56

Hesketh v. *Braddock,* 3 Burrows 366 ..... 38, 39

In re Ray Marshall v. *Sambo's Restaurant, Inc.*, Opinion of William A. Pope, II, A.L.J., Case No. 79-CL-547, dated 9/7/79 48

Offutt v. *United States*, 348 U.S. 11 ..... 18, 39, 55

Roemer v. *Board of Public Works of Maryland*, 426 U.S. 736 29

Tumey v. *Ohio*, 273 U.S. 510 ..... *passim*

United States v. *Citizens and Southern National Bank*, 422 U.S. 86 29,

United States v. *General Dynamics Corp.*, 415 U.S. 486 29,

United States v. *Jackson*, 390 U.S. 570 53

United States v. *Singer*, 374 U.S. 174 29,

United States v. *United States Gypsum Co.*, 333 U.S. 364 29,

Ward v. *Village of Monroeville*, 409 U.S. 57 ..... *passim*

Withrow v. *Larkin*, 421 U.S. 35 ..... 43, 52

PAGE

CONSTITUTION, STATUTES, AND REGULATIONS:

United States Constitution, Fifth Amendment (Due Process Clause) ..... *passim*

Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*:
Section 3(L), 29 U.S.C. 203(L) 37
Section 16(a), 29 U.S.C. 216(a) 55
Section 16(e), 29 U.S.C. 216(e) ..... *passim*
Section 17, 29 U.S.C. 217 55

Occupational Safety and Health Act, 29 U.S.C. 651 *et seq:*
Section 10(a), 29 U.S.C. 659(a) 49
Section 17(L), 29 U.S.C. 666(k) 7
29 U.S.C. 9(a) ..... *passim*
29 C.F.R. 570 37
29 C.F.R. 579.4(b) 48,
29 C.F.R. 579.5 ..... 35, 41
29 C.F.R. 579.6(a) 5, 47, 48

MISCELLANEOUS:

Federal Rule of Civil Procedure 52(a) 29

Recommendation No. 72-6, Administrative Conference of the United States, 1 C.F.R. 305.72-6 ..... 14, 15

Report in Support of Recommendation 72-6, Recommendations and Reports of the Administrative Conference of the United States, Vol. 2 (1971-72) 14, 15

The Budget of the United States Government, Fiscal Year 1979 ..... 15, 23, 25

PAGE

United States Department of Labor Sixty-Fourth Annual Report Fiscal Year 1976 ..... 26, 36,37

United States Department of Labor Sixty-Fifth Annual Report Fiscal Year 1977 ..... 26, 37

United States Department of Labor Sixty-Sixth Annual Report Fiscal Year 1978 ..... 26, 37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-253

RAY MARSHALL, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

JERRICO, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

QUESTIONS PRESENTED

The issue before this Court is clear:

> "Whether Congress may constitutionally pass a law whereby civil money penalties assessed by a federal agency are kept by that agency, outside of its regular budget, and are to be used by specific statutory mandate to reimburse the agency for its ordinary expenses in determining the violations and assessing and collecting the penalties."

Despite the clarity of this issue and its basis in the actual language of section 16(e) of the Fair Labor Standards Act, the Solicitor General attempts to obscure the issue of section 16(e)'s due process infirmities by casting it in permissive terms rather than in the mandatory terms of the statute. In the interest of clarity and conformity with the actual language of section 16(e) Question 1 should read:

> 1. Whether section 16(e) of the Fair Labor Standards Act, which authorizes civil penalties for violation of the Act's child labor provisions, violates the due process clause of the fifth amendment to the United States Constitution because it *provides that sums collected as* penalties pursuant to section 16(e) *shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties.*

The italicized portion of this restatement of Question 1 represents Jerrico's modification of the Labor Department's statement of the issue. This language is taken directly from section 16(e) and better reflects the section's *mandate* as to use of the penalties rather than the *permissive* use of the penalties suggested by the Labor Department.

It is Jerrico's contention, upheld by the district court, that the plain and unequivocal language of section 16(e)'s reimbursement provision created the clear impression and expectation in the minds of Labor Department officials assessing child labor civil money penalties that they would be reimbursed for their ordinary costs of such assessments from the pool of child labor penalties collected by the Labor Department. The language of section 16(e) should be scrutinized by this Court both in terms of its effect on the judgment of involved Labor Department officials and its potential as a dangerous precedent in the federal system.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

For the convenience of the Court, the relevant portions of the United States Constitution and the involved statutes are reprinted in full.

The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

Section 16(e) of the Fair Labor Standards Act, 29 U.S.C. 216(e), provides in pertinent part:

> Any person who violates the provisions of section 212 of this title, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. * * * Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5, and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be

applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with the provisions of section 2 of an Act entitled "An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes." (29 U.S.C. 9a)[1]

29 U.S.C. 9(a) provides:

> All moneys hereinafter received by the Department of Labor in payment of the cost of such work shall be deposited to the credit of the appropriation of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary of Labor, and notwithstanding any other provision of law, for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States.

[1]The last sentence of section 16(e) is quoted as it appears in the enacted version of the Statutes At Large, Pub. L. 93-259, § 25(c), 88 Stat. 72. The discrepancy between the language found in the Statutes At Large and that which is found in 29 U.S.C. 216(e) is discussed in Appellee's Supplemental Statement at page 6-7.

SUPPLEMENTAL STATEMENT

Jerrico wishes to correct several material misstatements and omissions in appellants' statement of the case.

1. The government contends that review of assessments by Administrative Law Judges is *de novo* in that the Administrative Law Judge may impose a penalty in any amount up to that assessed by the delegate of the Secretary. Brief for Appellants, 5. In fact, review by Administrative Law Judges is limited to the occurrence of violations; Administrative Law Judges have no authority to reduce penalties assessed for violations which they find have occurred.

The language of the statute and its implementing regulations is explicit in this regard:

> "Any administrative determination by the Secretary of the amount of such penalty shall be final, *unless* within fifteen days after receipt of notice thereof by certified mail *the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred,* in which event final determination of the penalty shall be made in an administrative proceeding . . ."
> 29 U.S.C. 216(e) (Emphasis Added)

> *"An exception to the determination that the child labor violation or violations for which the penalty is imposed, occurred* may be filed within 15 days after receipt of the notice of penalty by the person so charged."
> 29 C.F.R. 579.6(a) (Emphasis Added)

Indeed, this position was argued forcefully by Labor Department Counsel at the administrative level, and represents the view of Administrative Law Judges as to their own role in the penalty process. See discussion below at 47-48.

Review so limited cannot be characterized as *de novo;* in fact, the amount of the penalty for any specific violation is set conclusively by officials of the Wage and Hour Division, not subject to diminution by Administrative Law Judges (ALJ) where the ALJ finds that the violations did occur.[2]

2. The government sets out the language of section 16(e) as it appears in the United States Code; Brief for Appellants, 5; for most purposes this version is adequate. The Court should be aware, however, that the enacted language of section 16(e), Pub. L. 93-259, § 25(c), 88 Stat. 72, ended with a reference not to "section 9(a) of this title", but rather to "section 2 of an Act entitled 'An Act to authorize the Department of Labor to make special statistical studies upon payment of the cost thereof, and for other purposes' (29 U.S.C. 9 a)."

The false air of legitimacy created by section 16(e)'s cross-reference, discussed *infra* at 24-27, is even greater when the reimbursement provision is muddied with references to "statistical studies" and other lawful purposes. Indeed, a quick reading of section 16(e) as enacted could

[2]In the instant case, the penalty was reduced from $103,000 to $18,500 only on the specific finding of the Administrative Law Judge that the facts surrounding the assessment did not demonstrated a willful violation. The assessment had separately calculated $18,500 as the penalty for the alleged violations; the additional $84,500 was expressly tied to the contention that, in addition to the violations penalized, appellee was also liable for an additional penalty for willful violations.

leave one with the impression that penalty sums were not to be used for the "ordinary expenses" of the agency (a phrase which appears in section 9(a) but not in section 16(e)), but rather for statistical studies such as those conducted pursuant to section 9(a). In requesting the statutory provision for civil money penalties, Department of Labor officials had the recent, clearly written and constitutionally sound model of the Occupational Safety and Health Act's penalty provision, 29 U.S.C. 666(k) (enacted approximately three years before the enactment of section 16(e)). Their choice of language drawn from the statistical studies statute originally enacted forty years earlier, with a completely different scope and purpose, is hard to explain unless the Labor Department had a specific interest in retaining the penalties for its own use and masking the novelty and questionable constitutionality of such a procedure by referencing *by title* the statistical studies statute.

3. Appellants' statement includes only an elliptical reading of the operative provisions of section 9(a). Brief for Appellants, 5. In full the section requires that sums collected "be deposited to the credit of the appropriation of that *bureau, service, office, division, or other agency* of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary, *and notwithstanding any other provision of law, for the ordinary expenses of such agency and/or to secure the special services of persons who are neither officers nor employees of the United States."* This broad reimbursement language creates the impermissible risk and appearance of bias which appellee challenges.

4. The Department's statement that, "[w]ithout disputing these facts, appellee moved for summary judgment", Brief for Appellants, 8, is misleading to the extent that it implies acquiescence in the government's statement of the facts. Jerrico here corrects several misleading points in the statement by the Justice Department. Since, the court below granted Jerrico's Motion for Summary Judgment and accordingly rejected the Department of Labor's contention that material facts were in issue, many factual assertions by the Labor Department were found by Judge Gasch to be inapposite to his conclusion that section 16(e) violates the due process clause of the fifth amendment to the U.S. Constitution.

5. The most egregious error in the statement by appellants is the contention that:

> "[t]he district court acknowledged that . . . if the assessment is challenged it is subject to a *de novo* determination by an administrative law judge . . . and that there is no risk of bias or due process violation at the administrative law judge level." Brief for Appellants, 9.

The contention takes Judge Gasch's words out of context and materially misstates the holding in his opinion.

Judge Gasch, ruling on Jerrico's Motion for Summary Judgment, was bound to consider as correct all facts alleged by the Labor Department. The language in his opinion relied upon by the Department is simply a statement of the allegations raised by the Department. The paragraph begins, "Defendants maintain that . .." J.S. App., 10a. Judge Gasch's ruling did not reach these allegations: for purposes of Jerrico's Summary Judgment Motion only, he

accepted the Labor Department's allegations as true. Even under such a view Judge Gasch found a violation of due process since even in assuming *arguendo* that no due process infirmities adhere to the Administrative Law Judge level, an alleged violator would not have received the fair hearing at the "trial" level, as explicitly guaranteed in *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972). Upon appeal, this Court is free to consider the full range of the infirmities inherent in section 16(e), as noted below, at 21-22.

6. Finally, appellants fail to note, in criticizing Judge Gasch for not severing the reimbursement provision in section 16(e), Brief for Appellants, 10, that the issue of severance was not raised by the Department of Labor until the filing of its Jurisdictional Statement with this Court. Rather, the Department of Labor objected to Jerrico's prayer for relief, but did not propose any alternative other than complete denial of the Motion for Summary Judgment.

SUMMARY OF ARGUMENT

The reimbursement provision of section 16(e) of the Fair Labor Standards Act requires that sums collected as child labor civil money penalties be applied toward the reimbursement of the costs of determining the violations and assessing and collecting such penalties. In essence, Department of Labor Assistant Regional Administrators assessing penalties for alleged child labor violations receive a proportion of such penalties as reimbursement for their costs. Such penalties were assessed within broad discretionary dollar bounds reviewable by Administrative Law Judges only as to whether the alleged violations occurred. These funds may be expended "notwithstanding any other provision of law" for all ordinary expenses including salaries of government and non-government personnel, travel expenses, supplies, equipment, and other such expenses all of which would otherwise have to be paid out of the particular office's official budget and in accordance with applicable spending regulations.

Larger penalty assessments yield a larger pool from which such costs may be proportionately reimbursed. Such penalty dollars, free from Congressional restraint and without restrictions as to use are more desirable than Congressionally appropriated funds and by nature tend to influence the assessor to maximize such penalties.

Were this scheme somehow found constitutionally permissible by the Court, its use would no longer be restricted to the as yet unique provisions of section 16(e). Instead, hundreds of penalty statutes, which now provide for constitutionally permissible use of penalties, and which

generate hundreds of millions of dollars annually, could be modified or amended to contain reimbursement provisions as in section 16(e) of the Fair Labor Standards Act, creating the same appearance and risk of bias. Section 16(e) is a dangerous precedent for the federal system and should not be sanctioned by this Court.

The Solicitor General argues that the biasing influence of section 16(e) is insubstantial because the Department of Labor, in the first three years of the imposition of section 16(e) penalties, and during the pendency of this litigation, has allowed unobligated funds in excess of child labor civil money penalties collected to lapse to the U.S. Treasury. This argument ignores the potential for growth in this relatively new civil money penalty reimbursement procedure, which growth can be fostered by increased enforcement efforts and maximized penalties rewarded by an increased proportion of the growing penalty pool for the assessing office.

On the basis of the facts presented below, a distribution of $39,200 was made to the Atlanta regional office in the year following the $103,000 assessment of child labor civil money penalties against Jerrico by that office. There is no indication in the record that the Assistant Regional Administrator of the Atlanta office did not use these funds in addition to funds already in his budget. Indeed, appellants concede that such use is appropriate under the statute. When an agency or office thereof has the ability, as with section 16(e), to impose discretionary penalties and increase its proportionate share of penalties unrestricted by ordinary spending limitations as reimbursement for costs, the interest of that office can hardly be described as insubstantial or remote.

The Solicitor General also argues that the appearance of bias, the potential for bias and any actual bias of the Assistant Regional Administrator is immaterial since a trial *de novo* is provided before the Office of Administrative Law Judges of the U.S. Department of Labor. The Court in *Ward* v. *Village of Monroeville*, 409 U.S. 57, 61 (1972) held that *de novo* review was no cure for the lack of a neutral and detached judge in the first instance. The court below, applying the due process standard of *Ward* and *Tumey* v. *Ohio*, 273 U.S. 510 (1927) found, on the basis of the facts presented taken in the light most favorable to the Labor Department, that the Assistant Regional Administrator was potentially biased. J.S. App. 8a-9a. Moreover, Judge Gasch's application of the *Tumey* and *Ward* judicial due process standard to the Assistant Regional Administrator was supported by the facts. The Assistant Regional Administrator has broad discretion in assessing penalties of up to $1,000 per violation. His decision as to the amount of the penalty is not reviewable unless the alleged violator files an exception within fifteen days contesting the fact that the violations occurred. The Administrative Law Judge may then review the evidence relating to the occurrence of the violations but may reduce the assessed penalties only if he finds that the violations did not occur and only to the extent that the penalties were assessed for those violations. This limited scope of review is set forth in the statute, the regulations and the briefs of the Department of Labor in the administrative hearing below. Based on the discretion of the Assistant Regional Administrator in assessing penalties, the finality of his decision unless the statutorily limited exception is taken, and the narrow scope of review by an Administrative Law Judge, the facts clearly demonstrate the judicial or quasi-judicial nature of the Assistant

Regional Administrator's penalty assessing authority. Yet beyond the narrow finding on summary judgment below that Assistant Regional Administrators have an improper interest in the penalties they impose, it is equally proper for this Court to affirm the injunction which issued below on the basis of the potential for bias and the appearance of bias at the Administrative Law Judge level.

The Court should deny the government's request that the penalty reimbursement provision of section 16(e) be severed from the remainder of the section, allowing the civil money penalty system to remain in force. While severance may ordinarily be appropriate, it is ill advised in this situation. First, the appearance of bias and potential for bias derive from the very language of the reimbursement provision of section 16(e). Since actual notice to all Labor Department personnel of severance of section 16(e)'s reimbursement provision cannot be guaranteed, the potential for bias continues. Moreover, the appearance of bias remains in all codified versions of section 16(e) now in existence. Second, if the reimbursement clause of section 16(e) were severed, it is unclear where the civil money penalty funds would go. This would leave the remaining portion of section 16(e) incomplete, requiring the Court to direct disposition of the funds. Since this is a Congressional responsibility and since only speculation can be offered as to what Congress might have intended as an alternate disposition of the funds, the Court should deny the Solicitor General's severance request. Lastly, if the Court grants the Solicitor General's severance request, the injunction as to appellee (issued by the district court) should remain in effect. Severance of the unconstitutional provisions of section 16(e) would not correct the bias found by the court below to have existed in the penalty assessment of Jerrico.

ARGUMENT

I. REVERSAL OF THE DISTRICT COURT'S DECISION WOULD SET A DANGEROUS PRECEDENT FOR THE FEDERAL SYSTEM

Were this Court to somehow find the assessment and reimbursement scheme contemplated by section 16(e) to be within the due process of law standard, the due process of law guarantee of the fifth amendment would be seriously jeopardized with regard to government assessment of civil money penalties against private citizens.

The precedential effect of this Court's validation of the civil money penalty assessment and reimbursement process mandated by section 16(e) of the Fair Labor Standards Act for the multitude of civil penalty provisins throughout the government, makes it imperative that this Court declare the scheme unconstitutional by affirming the decision below. Already widespread and of significant dollar value, the use of civil money penalties as a sanction for violations of federal and state statutes and regulations is increasing at a rapid rate. *See,* Recommendation No. 72-6, Administrative Conference of the United States, 1 C.F.R. 305.72-6; Report in Support of Recommendation 72-6, Recommendations and Reports of the Administrative Conference of the United States, Vol. 2 (1971-72), 896.[3]

[3]"Federal administrative agencies enforce many statutory provisions and administrative regulations for violation of which fixed or variable civil money penalties may be imposed. During Fiscal 1971, seven executive and thirteen independent agencies collected well in excess of $10 million, in over 15,000 cases; all evidence points to a doubling or tripling dollar magnitude and substantially increasing caseload within the next few years. Increased use of civil money penalties is an important and salutary trend." 1 C.F.R. 305.72-6 (a), (b) (Footnote Deleted).

Exhibit 1 to Appendix A of the Report in Support of Recommendation 72-6, *supra,* references approximately two hundred fifty statutory provisions as merely an "illustrative catalogue" of enactments under which civil money penalties may be imposed. Many provisions, such as section 16(e), have been enacted since the time of the report. In 1977, $103 million was collected by the government as "fines, penalties, and forfeitures" (resulting from both civil and criminal actions); 1978 and 1979 estimates were $110 million and $145 million, respectively.[4] No statutory provision other than section 16(e), however, provides that penalties assessed pursuant to it shall be kept by the assessing agency for its ordinary expenses.

Were the potential bias, inherent in a scheme in which agencies are reimbursed for, and in direct relation to, their assessment and collection of civil money penalties, to become the norm rather than the unique exception, the Constitution's guarantee of due process of law would be seriously jeopardized for any alleged violation of statute or regulation subject to administrative enforcement.[5]

Section 16(e) remains unique among federal statutes with respect to its mandate that sums collected as penalties be used to reimburse the Labor Department for its costs of enforcement.[6] If this reimbursement scheme is validated by

[4]The Budget of the United States Government, Fiscal Year 1979, Table 10, p. 439.

[5]The recommendation of the Administrative Conference, that the use of civil money penalties be expanded, is limited with respect to agency action not subject to judicial review *de novo* (e.g. section 16(e) penalties) by "[t]he likelihood that an agency (or a group of agencies in combination) will establish *an impartial forum in which cases can be efficiently and fairly decided.*" 1 C.F.R. 305.72-6(B) (1) (g) (Emphasis Added).

[6]See Opinion of Judge Gasch, J.S. App. 11a.

the Court as within the due process requirements of the Constitution, all regulatory statutes providing for civil money penalties could constitutionally contain the identical reimbursement provision as in section 16(e). This would permit federal agencies presently assessing annually in excess of One Hundred Million Dollars ($100,000,000)[7] in penalties to spend such funds entirely outside the budgetary process and in addition to appropriated funds for uses including reimbursement of the ordinary expenses of the agency and the hiring of individuals not employees of the government, notwithstanding any other provision of law.[8] Such funds are most attractive to administrators because they may be expended "notwithstanding any other provision of law" and, as outside of the reported outlays from appropriations to the agency, are to a great extent hidden from Congressional oversight. Moreover, the only limitation on funds available to an agency having this new-found spending discretion would be the maximum penalty per violation contained in the statute and the ability of agency enforcement officials to find violations of the statute. The agency could gear its enforcement activities to the production of whatever level of penalty collections it desired.

A. Section 16(e) Violates The Due Process Clause Of The Fifth Amendment In That It Creates The Appearance Of Bias, The Potential For Bias And Actual Bias

The plain language of section 16(e) would lead the average man as assessing official to expect a significant

[7] *See*, footnote 4, *supra*.

[8] *See*, the language of section 16(e) and section 9(a).

return benefit resulting from, and dependent upon, his imposition of penalties under that section. Due process of law cannot be ensured in any proceeding under section 16(e) no matter how its reimbursement provision is construed or applied.

Section 16(e) mandates a regulatory scheme in which Department of Labor officials may reasonably expect to add significantly to the funds at their disposal from the return of civil money penalties to the credit of the appropriation of the bureau, service, office, division, or other agency of the Department of Labor as reimbursement for the cost of determining the violations and assessing and collecting the penalties. Such clear and unequivocal statutory language creates a *prima facie* appearance of bias and is a potential and significant influencing factor on the officials' judgment in each of their critical decisions.

Due process of law is a prophylactic concept; its aim is not only to provide a remedy for those who can meet the near-impossible burden of demonstrating actual impropriety or bias, but also to prevent even the possibility of undue influence and to preserve public confidence in the integrity of the government. Thus, disqualification is required whereever the potential for bias or the appearance of bias in judgment exists; wherever the situation is one "which would offer *a possible temptation* to the average man as a judge . . . which *might* lead him not to hold the balance nice, clear, and true . . ." *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1972) (Emphasis Added). *See also*, *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972).

The standard of concern for public confidence in the integrity of government officials is best expressed in Mr. Justice Frankfurter's admonition, "Justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954). Viewed against this standard, the constitutional infirmity in section 16(e) exists even without demonstration of any actual reimbursement of Department of Labor offices. Questions of the amount of penalties and whether, when, and how such sums were used, while important, are secondary to the initial due process determination. The proper scope of inquiry is rather, *whether any official might*, at the time he made any critical decision in the section 16(e) penalty process, *have had an expectation* that the funds available to meet the "ordinary expenses" of his office would be increased by any part of the penalty. The language of the statute is plain, mandatory, and unequivocal in this regard:

> "Sums collected as penalties pursuant to this section *shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalties.*"
> 29 U.S.C. 216(e) (Emphasis Added)
> ". . . and may be used, in the discretion of the Secretary of Labor, and *notwithstanding any other provision of law, for the ordinary expenses of such* [*bureau, service, office, division or other agency*] and/or to secure the special services of persons who are neither officers nor employees of the United States."
> 29 U.S.C. 9(a) (Emphasis Added)

The plain language of the provision certainly "would offer a possible temptation to the average man" to maintain

a high level of section 16(e) penalty assessments. Due process of law cannot be ensured under such a scheme. The Court need not determine whether the expectation of the involved officials was justified or ultimately fulfilled; it is the risk that an expectation of improper benefit will enter into the decision-making process which violates the fifth amendment. Appellants, while attempting through a strained reading of the statutory provision to show that the language of section 16(e) should not have led the involved officials to expect reimbursement, *do not deny that it could have this effect.* Brief for Appellants, 28-32. Without reaching, at this juncture, the merits of the various allegations made by appellants in arguing that the risk of bias is slight,[9] it is enough to note simply the existence of that risk and the impossibility of determining its exact effect. For the fifth amendment provides a *guarantee* of due process, not a mere probability of due process. "[M]ight not a[n employer] with reason say that he feared he could not get a fair [hearing] or a fair [penalty] from one who would have so strong a motive to help his [office] by [assessment] and a heavy [penalty]?" *Tumey*, at 533 (*mutatis mutandis*).

The entire negotiating process of settling child labor violations and agreeing to proposed civil money penalties without pursuing the statutory right to an administrative hearing is tainted with this fear. For various reasons the settlement process is often the final step in an assessment; yet even review by Administrative Law Judges and the courts would not remedy the defect at the Assistant Regional Director Administrator level, for the Constitution

[9] *See*, Part II of this Brief which contains our argument as to the substantiality of the biasing influence of section 16(e).

guarantees a fair hearing at the initial level of an assessment, without forcing an alleged violator to take exception to or appeal such initial determination in order to vindicate his rights. *Ward*, 409 U.S. 61-62.

The undisputed circumstances in this matter show that the Department of Labor officials who assess section 16(e) penalties in fact had a justifiable basis for an expectation of increasing the funds at their disposal through assessing section 16(e) penalties: they could rely on the plain language of the statute, *supra*, of which they were aware both by fair implication and by admission, App. 48, 50, 53-55; on the discussion of the disposition of funds at various official conferences, App. 44, 47-48, 51, 52-53; and on the fact that sums collected as penalties actually were returned to their offices in 1977. Indeed, the reimbursement procedure was only halted when suit was filed in this case challenging its constitutionality. Currently, penalty funds are held in escrow, presumably for distribution upon requested reversal. Yet these factors go beyond the showing necessary to demonstrate a violation of due process. Judge Gasch, ruling on Jerrico's Motion for Summary Judgment, based his decision on the *actual* influence clearly shown in the undisputed facts presented to him.[10] Yet it is equally

[10]"The pro rata crediting of sums received as penalties by the Department of Labor to the various bureaus and regional offices charged with imposing those penalties tends to make those offices partisan to maintain a high level of penalty assessment. Clear evidence of this potential biasing effect is the assessment at the regional level of civil money penalties against plaintiff in excess of $100,000. The Assistant Regional Administrator imposed a fine which was nearly the maximum that could have been imposed under the statute. For fiscal 1977, the year following the initial imposition of penalties in this case, the regional office in Atlanta, which had jurisdiction over plaintiff, was allotted $39,200 as its pro rata share of total penalty funds received. The propensity of this relationship between assessment and allotment of penalties to create an atmosphere that permits less than objective balancing of alleged violations against proposed penalties does not comport with the notions of fairness inherent in due process of law." J.S. App. 8a-9a (Footnotes Deleted).

apparent, on full analysis, that the constitutional defect inheres in the very language of section 16(e): no possible construction or application of the section could overcome the potential for biased assessments and the appearance of improper interest which the clear, unequivocal statutory language creates. The argument that a statute which violated due process of law "on its face" could be upheld if "reasonable as applied" to particular parties was specifically rejected by this Court in *Aptheker* v. *United States*, 378 U.S. 500, 515-517 (1963);

> "To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute [under which an official might have come to the same administrative decision] but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects."
> *Aptheker*, at 515.

This Court is, of course, not confirmed to the grounds upon which Judge Gasch held section 16(e) unconstitutional, but may consider as well any alternate rationale leading to the same result. *See*, e.g., *California Bankers Association* v. *Shultz*, 416 U.S. 21, 71 (1974); *Dandridge* v. *Williams*, 397 U.S. 471, 475 (1970); *see also*,

Fusari v. *Steinberg*, 419 U.S. 379, 387, *rehearing denied*, 420 U.S. 955(1975). Section 16(e) because of its appearance of, and potential for, bias should be declared unconstitutional on its face.

B. The Interest Of Assessing Officials In Section 16(e) Penalty Funds Is Increased Because That Section's Procedure Circumvents The Normal Budgetary Process And Precludes Congressional Oversight And Control Of The Use Of Such Funds

A declaration of the unconstitutionality of section 16(e) is even more appropriate in view of that section's effect, unique among civil penalties, upon the funding of the offices which impose the penalties. By the particular language of section 16(e) and of section 9(a), sums collected as civil penalties could be and were kept by the Department of Labor, outside of the normal budgetary process. This peculiar and dangerous treatment of funds results from the transplanting of the purely business-related, market-oriented reimbursement process of section 9(a) in a statistical studies context into the realm of enforcement sanctions. This is evident from the specific terminology used in the provision: the penalty funds "shall be *applied toward reimbursement* of the costs" (29 U.S.C. 216(e)) of determining the violations and assessing and collecting the penalty and

> "shall be *deposited to the credit of the appropriation* of that bureau, service, office, division or other agency of the Department of Labor which supervised such work, and may be used, in the discretion of the Secretary of Labor

> and *notwithstanding any other provision of law, for the ordinary expenses* of such agency . . ." 29 U.S.C. 9(a) (Emphasis Added)

While the unusual cross-reference to an unrelated statistical study provision in a separate Act may draw attention away from the disposition of the penalty funds, reference to the budget documents makes clear the available disposition of the penalties collected by the Labor Department.

Amounts paid over to the federal government are classified in two general categories, "budget" or "governmental" receipts, and "offsetting collections." The Budget of the United States Government, Fiscal Year 1979, 282. Sums collected as "fines, penalties, and forfeitures" are ordinarily and properly classifed as "budget receipts" and deposited in the Treasury. *Id.*, 283, 439. Section 16(e) penalties, however, are treated as "*offsetting collections*, which are deducted from disbursements in calculating total outlays." *Id.*, 283. Offsetting collections should properly include only "collections from other government accounts or *from transactions with the public that are of a business-type or market-oriented nature.*" *Ibid.* (Emphasis Added). The anomalous position of section 16(e) penalties results from the statutory mandate that such sums be used as "reimbursement", "deposited to the credit of the appropriation" of the offices involved in the assessment process. Offsetting collections:

> " . . . are classified into two major categories: *collections credited to appropriation or fund accounts* and *offsetting receipts* (that is, amounts deposited in receipt accounts). In general, the

distinction between these two major categories is that *collections credited to appropriation or fund accounts can be used without appropriation action by the Congress,* whereas funds in receipt accounts cannot be used without being appropriated.

Collections credited to appropriation or fund accounts occur in two circumstances:

-*Reimbursements* - When authorized by law, amounts collected for materials or services furnished (for example, amounts received from the public to pay expenses of providing information under the Freedom of Information Act) are treated as reimbursements to appropriations. *These collections are netted in determining outlays from such appropriations . . .*" *Ibid.* (Emphasis Added in Part)

Thus, while by nature civil penalties are fines, section 16(e) penalties are not included in the nation's general revenues; and while not in any way "of a business-type or market-oriented nature", they are treated as "offsetting collections" as if regulatory law enforcement were a private enterprise.[11] While disposition on summary judgment

[11]The reimbursement provision of section 9(a) is perfectly appropriate for its original context, i.e. reimbursement for *services performed* by the Department for private parties. In that context, no constitutionally protected right is involved, parties consent to such costs by seeking the services of the Department, and the amounts so paid to the Department are limited to the actual costs of the specific work done. In contrast, amounts assessed as section 16(e) penalties may greatly exceed the marginal cost to the Department in assessing such penalties, and the penalty process works a deprivation of property such as must accord with the fifth amendment's guarantee of due process of law. Judge Gasch criticized the false air of legitimacy and the anomalous mix of governmental penalty assessments and business-like cost reimbursement created by section 16(e). J.S. App., 12a.

below did not require specific findings on the point, the Department has never suggested any alternate interpretation of the terms used in section 16(e) and 9(a); rather, the clear implication of appellants' statement of the case supports this view of the treatment of section 16(e) funds: " . . . it is theoretically possible for the challenged provisions of 29 U.S.C. 216(e) and 9a to increase the monies available to ESA in a fiscal year beyond those appropriated to it by Congress . . . " Brief for Appellants, 8.

The transplanting of the section 9(a) statistical study cost reimbursement concept to the section 16(e) penalty imposition context creates more than an accounting anomaly. Funds so collected remain in the Department and may be used to offset expenses *without appropriation action by Congress* and *without any corresponding decrease in properly appropriated funding.* The practical result is that the Department and various of its subdivisions may to a significant extent write their own budgets, apart from, and in addition to, sums appropriated by the Congress. Furthermore, there is no effective Congressional oversight of administrative activity under the section. Incoming funds remain within the Department, never appearing as governmental receipts; and the expenditure of such funds offsets the ordinary outlays of the agency, so that the amount reported as "outlays" does not reflect the true spending of the Department. Nor are the annual reports of the Department of any assistance in accurately

conveying the amount actually collected as section 16(e) penalties or the use of such funds. Thus, the Congress was kept in the dark as to the true level of operations of a major federal program.[12] Unlike charges under section 9(a),

[12]Appellants argue that "Congress might well simply appropriate a correspondingly lesser amount" for subsequent years, should it be displeased with the current level of enforcement operations. Brief for Appellants, 27. Such a procedure, of course, could not repair the failure of due process in current assessments: assessing officials would still tend to assess high penalties in the hope of receiving the funds in addition to whatever amount they may receive as appropriations. However, appellants also fail to explain how the Congress would be informed as to the amount and use of section 16(e) penalties, or even why the curiosity of any Congressman might be aroused to investigate the point. The funds are expended by the Department in offsetting "ordinary expenses", and thus do not appear as either appropriations or as outlays. The annual reports of the Department, while mentioning assessments, do not indicate the total amount collected as such penalties; nor is there any indication of how or by whom such funds were used — or even that the funds remained within the Department. United States Department of Labor Sixty-Fourth Annual Report Fiscal Year 1976, at 29, 68, 100; United States Department of Labor Sixty-Fifth Annual Report Fiscal Year 1977, at 63, 82, 114; United States Department of Labor Sixty-Sixth Annual Report Fiscal Year 1978, at 62, 92, 138. Even in the report for fiscal year 1977, when $650,000 in penalties was collected and $560,000 distributed as reimbursements (the Department has never accounted for the remaining $90,000), there is not even the slightest hint that the funds available for the "ordinary expenses" of any office were increased by such amounts. Only a single sentence in the section concerning the Employment Standards Administration notes assessments; a paragraph under the heading, "General Legal Services" in the section concerning the Office of the Solicitor (not, as one might expect, under the heading, "Fair Labor Standards") notes the collection of a mere $47,195 from pending 1976 cases but does not report amounts collected as a result of the assessment finally determined by the Department in 1977. United States Department of Labor Sixty-Fifth Annual Report Fiscal Year 1977, at 63, 82. Thus, the Congress never directly learns of amounts collected as section 16(e) penalties, of who controls such funds, of how such funds are distributed and used, or of the level of operations of the Department in this area.

penalties imposed under section 16(e) are not limited to the actual marginal cost of the section 16(e) procedure; rather, the amount available to the Department to meet its "ordinary expenses" may be increased by up to ($1,000) for each and every violation, or alleged violation, for which penalties are paid. Potentially, such sums are limited only by the number of violations alleged to occur.

In sum, Department of Labor officials involved in writing the regulations which define violations for which section 16(e) penalties may be imposed, setting enforcement policies for such regulations, determining the occurrence of violations, and setting the penalties for such violations, are further given the authority to collect and use funds resulting from these activities and to do so without Congressional oversight.[13] The dual dangers of the inherent failure of due process in assessments and the unexplained abdication of Congressional oversight and control mandate a firm declaration that the unique administrative enforcement scheme of section 16(e) is unconstitutional.

II. THE POTENTIAL FOR BIAS IN SECTION 16(e) PENALTY PROCEEDING IS SUBSTANTIAL

Judge Gasch's decision and opinion below did not reach the facial unconstitutionality of section 16(e), nor did he consider the substantial impact of the section on federal administrative processes outside of the scope of the particular statute at issue. His decision was based upon the undisputed evidence establishing an actual and improper

[13]Such a broad abdication of authority and responsibility by the Congress is of questionable constitutionality and no apparent benefit: at the very least, it should require an express statement of intent by the Congress. Yet the legislative history of section 16(e) is devoid of any mention of the critical reimbursement provision.

interest on the part of assessing officials in maintaining a high level of civil money penalty assessments and collections.

In analyzing the due process infirmities inherent in section 16(e) penalty provisions, the fact that Judge Gasch was fully aware "that the crucial consideration is the remoteness of the pecuniary interest alleged to be the biasing influence." (J.S. App., 6a) could not be more clear:

> "The Court is persuaded that this *direct and tangible relationship between reimbursement and assessment* is violative of due process. The pro rata crediting of sums received as penalties by the Department of Labor to the various bureaus and regional offices charged with imposing those penalties tends to make those offices partisan to maintain a high level of penalty assessment . . . *The propensity of this relationship between assessment and allotment of penalties to create an atmosphere that permits less than objective balancing of alleged violations against proposed penalties* does not comport with the notions of fairness inherent in due process of law . . . *The relationship between assessment of penalties and allotment of funds is direct, clear, and creates an impermissible potential for bias* in the initial decision-making process."
> J.S. App.8a-9a, 11a. (Emphasis Added)

Appellants do not contend, in arguing that the risk of bias under section 16(e) is insubstantial, that Judge Gasch misapprehended the standard to be judicially applied here;

rather, they propose that his conclusion was erroneous under that standard. Brief for Appellants, 25. Such a contention must meet the "clearly erroneous" standard. Fed. R. Civ. P. 52(a).

> "Insofar as that conclusion derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law. Insofar as the conclusion is based on 'inferences drawn from documents or undisputed facts, . . . Rule 52(a) of the Rules of Civil Procedure [requiring a showing that such conclusion be clearly erroneous] is applicable.' *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394 (1948)."
> *United States* v. *Singer*, 374 U.S. 174, 194 n. 9 (1963). *See also, Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 758 (1976); *United States* v. *Citizens and Southern National Bank*, 422 U.S. 86, 114 (1975).
>
> "The findings and conclusion of the District Court are, of course, governed by the 'clearly erroneous' standard of Fed. Rule Civ. Proc. 52(a) just as fully on direct appeal to this Court as when a civil case is being reviewed by a court of appeals."
> *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 508 (1974).

Appellants contend that "section 16(e) is not invalid under *Tumey* and *Ward* because the potential bias allegedly resulting from the reimbursement provision of the statute is insubstantial and remote." Brief for Appellants, 23 (Initial Capitals Deleted).

Appellants' contention is based in part on the fact that sums collected as civil money penalties under section 16(e) constituted less than one percent of the Employment Standards Administration's national budget and that ESA has each year lapsed unobligated funds to the Treasury in amounts greater than sums collected as child labor civil money penalties. This contention ignores the potential for growth of the relatively new civil money penalty provisions of section 16(e) and the fact that any increase in an agency's appropriation through available civil money penalties will better enable that agency to stay within its budget. Furthermore, this contention ignores the fact that evidence presented in the court below indicates that the Atlanta regional office received a distribution from such penalties in the amount of $39,200 in the year following assessment of penalties against Jerrico. There is no indication in the record that these funds were not used by that office in addition to funds already in its budget.

Judicial opinions on "the remoteness of . . . the biasing influence" show a concern for two conceptually distinct issues: the *type* of interest alleged to violate due process, and the *magnitude* or substantiality of the interest. *See*, e.g., *Tumey*, at 522 ("Nice questions, however, often arise as to what the *degree* or *nature* of the interest must be.") (Emphasis Added)

Direct pecuniary remuneration is only one type of judically cognizable corruption of judgment; the advantage "alleged to be the biasing influence" may be one which accrues to an entity in which the official whose judgment is challenged serves in an executive capacity."A situation in which an official perforce occupies two practically and

seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law." *Tumey*, at 534; *see also, Ward, passim; Dugan* v. *Ohio*, 277 U.S. 61 (1928), *passim*.

Appellants place great weight on the contention that Department of Labor officials are not personally reimbursed through additions to their salaries for section 16(e) assessments. Brief for Appellants, 25-26. Such an allegation, however, misses the point.

As discussed above, section 16(e) provides in no uncertain terms that penalty funds be used by the bureaus, services, offices, divisions and agencies of the Department of Labor, "notwithstanding any other provision of law, for the ordinary expenses of such agency" as reimbursement for work involved in determining the violations and assessing and collecting penalties. The account including these ordinary expenses includes the salaries of the involved officials, and thus presents a *prima facie* appearance of bias independently sufficient to support a declaration of unconstitutionality. However, the danger of undue influence found by Judge Gasch lies in the concern of the assessing official for the financial interest of the regional office in which he is chief executive, and for the interest of the branch of the Department of Labor in which he is among the top executives:

> "The pro rata crediting of sums received as penalties by the Department of Labor to the various bureaus and regional offices charged with imposing those penalties tends to make those offices partisan to maintain a high level of penalty assessment. Clear evidence of this potential

biasing effect is the assessment at the regional level of civil money penalties against plaintiff in excess of $100,000. The Assistant Regional Administrator imposed a fine which was nearly the maximum that could have been imposed under the statute. For fiscal 1977, the year following the initial imposition of penalties in this case, the regional office in Atlanta, which had jurisdiction over plaintiff, was allotted $39,200 as its pro rata share of total penalty funds received. The propensity of this relationship between assessment [i.e. judicial concern] and allotment of penalties [i.e. executive concern] to create an atmosphere that permits less than objective balancing of alleged violations against proposed penalties does not comport with the notions of fairness inherent in due process of law . . . The relationship between assessment of penalties [i.e. judicial function] and allotment of funds [i.e. executive function] is direct, clear, and creates an impermissible potential for bias in the initial decisionmaking process."
J.S. App., 8a-9a, 11a. (Footnotes Deleted)

For the year noted by Judge Gasch, fiscal 1977, the national and regional offices of the Wage and Hour Division, and the Solicitor's Office, received over half a million dollars in section 16(e) penalty distributions. J.S. App., 9a, n.6.

Concerning the interest of assessing officials as executives, appellants further assert that "there is no realistic possibility that these officers' 'executive

responsibilities' (409 U.S. at 60) would influence their judgment in assessing penalties." Brief for Appellants, 26. In justification of this contention, appellants allege a lack of "budgetary functions" on the part of Assistant Regional Administrators, and further propose that the payment of section 16(e) penalties to a national office, for distribution to the various regions, obviates any due process infirmities in the scheme. Brief for Appellants, 26.

The simple answer to these contentions is that they do not address the full scope of the potential bias in section 16(e). Even if Assistant Regional Administrators were unconcerned with reimbursement of their regional offices, Department of Labor officials superior to them may still be biased in the roles they play in the assessment process. While appellants' contentions are limited to Assistant Regional Administrators, the provision for reimbursement may well affect the judgment of officials who set overall enforcement policy and to whom Assistant Regional Administrators must answer; officials who draft regulations, violation of which is punishable by section 16(e) penalties; officials who must approve of negotiated settlements of proposed civil money penalty assessments; and even Administrative Law Judges, who must by the terms of section 16(e) be reimbursed for their role in the penalty process. Of what benefit would it be to an alleged violator, even if it were true, that the official who first imposes a fine is not directly concerned with the amount assessed, when every other official with whom the alleged violator must have contact in pursuing his administrative remedy is apparently interested in seeing alleged violators adjudged liable for the greatest penalty possible? It is unnecessary for this Court to fathom the lowest reaches of

section 16(e)'s influence where it is certain that an impermissible interest may enter at some critical point in the administrative process.

Yet beyond this simple answer, appellants' contention is incorrect even as limited to Assistant Regional Administrators. Appellants misconstrue the standard laid down in *Tumey*, *Ward*, and *Dugan* for bias based on an executive responsibility. Budgetary functions *per se* are not a prerequisite. Rather, the test is whether the official's duties "may make him partisan to maintain the high level of contribution" from what should be a "neutral and detached" tribunal. *Ward*, at 60, 62. It is only where the official has "no executive but only judicial duties", *Dugan*, at 65, that his responsibilities will not interfere with his judgment.

Assistant Regional Administrators are executives in the Department of Labor, and chief executives in their own regions, with responsibilities which interfere with their judgment in section 16(e) penalty assessments. Moreover, despite appellants' unsupported contention to the contrary, the circumstances indicate that Assistant Regional Administrators do in fact have budgetary responsibility; else why would methods for distribution of penalty funds be an "Action Item" for discussion at a conference of such administrators? App. 44. Furthermore, Assistant Regional Administrators have executive duties as chief officers in their regions, such as would imply budgetary responsibility. Since appellee does not have access to the internal structure of the Department of Labor, a presumption of budgetary duties should run in its favor; appellants should be required to produce more than a bald

assertion to the contrary. However, apart from the question of fiscal responsibility, it is sufficient to note the general executive duties of Assistant Regional Administrators: as executives they are responsible for the affairs of their regions, and are thus outside of the scope of *Dugan's* allowance for purely judicial officers. Equally important, they are responsible as executives to the national office of the Wage and Hour Division and the Employment Standards Administration; such a position naturally carries with it a concern for the funding of the large entity, as well as a concern for one's possible advancement within the Department.

The executive responsibility of Assistant Regional Administrators is further apparent from the level of discretion granted them in setting enforcement policies for the section 16(e) penalty process: they are "authorized to represent the Secretary of Labor in assessing penalties", App. 47; and are charged with executive discretion in setting the amount of penalties in light of the factors set out at 29 U.S.C. 216(e) and 29 C.F.R. 579.5, App. 50-51. To argue that such an official, both within his region and as an officer of the Wage and Hour Division and the Employment Standards Administration, has "no executive but only judicial duties" exceeds credulity.

The payment of section 16(e) penalties to a national office, from which distribution to regions is required in proportion to their costs of child labor activity, does nothing to obviate the bias in assessment where, as discussed above, Assistant Regional Administrators expected to receive all or part of such funds in distributions at the time they assessed the penalties. As the agenda item

concerning distribution of penalty funds discussed at various official conferences most clearly suggests, the hope of receiving section 16(e) funds was not indefinite or remote. App. 44.

In addition to challenging the "executive responsibility" interest of Assistant Regional Administrators, appellants contend that any such interest is too slight to affect the officials' judgment, and thus acceptable by due process standards. Again, Judge Gasch's findings and conclusions, *supra*, applying the "substantiality" standard of *Tumey*, are clear. It is undisputed that the Atlanta regional office received $39,200 in section 16(e) penalty funds, and that over half a million dollars in such funds was distributed throughout the Employment Standards Administration, in 1977. It is difficult to see how such sums could be characterized as *de minimis*, especially when coupled with the fact that such sums are in addition to appropriated amounts and not subject to Congressional control, as discussed above.

Yet a more telling figure is the amount assessed as section 16(e) penalties, not the amount collected or the amount distributed; such a figure more clearly reflects the expectation of regional officials that they would receive such funds, and highlights the distorted judgment such an expectation will produce. In 1976, when $151,000 in section 16(e) penalties was collected, J.S., 7, assessments "totalled almost $463,000", United States Department of Labor Sixty-Fourth Annual Report Fiscal Year 1976, at 29. Similarly, while collections in 1977 and 1978 reached $650,000 and $592,000 respectively, J.S., 7, assessments were "nearly $1.3 million" and "nearly $1.9 million"

respectively, United States Department of Labor SixtyFifth Annual Report Fiscal Year 1977, at 63; United States Department of Labor Sixty-Sixth Annual Report Fiscal Year 1978, at 62.[14]

While the amounts *actually returned* to regional offices are sufficient to meet *Tumey's* standard of a "possible temptation to the average man as a judge", it is clear that the *expectations* of the assessing officials may have run even higher. Should this Court uphold section 16(e), sums collected and held within the Department could readily amount to hundreds of millions of dollars annually, given the hundreds of thousands of minors under age 18 employed and the Department of Labor's authority and responsibility to determine by regulation what acts or omissions on the part of an employer shall constitute punishable child labor violations.[15] As discussed above, the ability to finance opeations and to retain such sums is all the more tempting because it is outside of Congressional oversight and control or other restrictions imposed by law. Amounts already large enough to merit discussion at official conferences, totalling in the thousands of dollars for individual regions, and received without the safeguards of the appropriations process, cannot be considered *de minimis* in the mind of a regional executive.

---

[14]As noted above, despite the reporting of section 16(e) *assessments*, and elsewhere in the Labor Department's Annual Report, the reporting of the dollar value of *assessments considered by administrative law judges*, the Annual Reports *do not* give the total amounts *collected* as section 16(e) penalties, nor do they indicate that such sums were retained by the Department of Labor.

[15]The Department's responsibility and authority derive from section 3(L) of the Fair Labor Standards Act (29 U.S.C. § 203(L)) and regulations promulgated thereunder at 29 C.F.R. Part 570.

While sums collected as section 16(e) penalties thus exceed the *de minimis* exception noted in *Tumey* ("*so remote, trifling,* and *insignificant . . . incapable* of affecting the judgment . . . " *Tumey*, at 531), nevertheless this Court should not feel bound by even the minimal "substantiality" requirements of *Tumey*. For the Constitution's guarantee of "due process of law" contemplates the meaning of that phrase at English common law at the time of the adoption of the Constitution. *Tumey*, at 523, and cases therein cited.

> "These cases show that, in determining what due process of law is, under the Fifth or Fourteenth Amendment, the Court must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, which were shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. . . . Indeed, in analogous cases [at common law] it is very clear that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable.[Citations Omitted]"
>
> *Tumey*, at 523, 524.[16]

[16]An explanation of appellants' "quote" from Burrows' nonexistent South Carolina reports is in order. Appellants contend that due process is not violated " '[i]f the alleged personal interest' 'is too slight to excite prejudice against a [party]' (*Tumey v. Ohio, supra,* 273 U.S. at 529-530, quoting *Hesketh v. Braddock,* 3 Burrows 336 (S.C. 1847) . . . " Brief for Appellants, 23. The source of the quote is actually *City Council* v. *Pepper,* 1 Richardson (S.C.) 364, 366 (1845); and that case distinguished the common law principle, noted in *Hesketh* and

This Court has been willing to countenance the development of the "insubstantial" exception when reviewing the procedures of states. *Tumey*, 529-531. Yet neither *Tumey* nor its progeny have held such an exception applicable to the federal system. Far from an anachronistic technicality, a strict due process standard, disqualifying official for even the slightest interest in the outcome of a penalty assessment, would be in line with current federal concerns. The federal policy reflecting great concern in avoiding even the slightest impropriety is best summed up in the axiom of Mr. Justice Frankfurter, quoted above at page 18.

In applying the standard laid down in *Tumey* to arbitration under a federal statute, this Court has noted that "in *Tumey* the Court held that a decision should be set aside

applicable to the instant case, on the ground that "all the people of the State, through their legislature [might] dispense with the common law objection", *Pepper*, at 366; *Tumey*, at 529. *Pepper* was, of course, decided prior to the enactment of the fourteenth amendment; further, the federal legislature has no authority to amend or overrule the Constitution by statutory enactment. Thus, the allowance of a slightly less rigid due process standard in state proceedings has no application to the concept of the due process of law contemplated by the fifth amendment; the strict common law standard remains in force. What *Hesketh* actually said on the subject was:

> "There is no Principle in the Law more settled than this — That *any* Degree, even the *smallest* Degree of Interest in the Question depending is a decisive Objection to a Witness, and much more to a *Juror*, or to the *Officer* by whom the Jury is *returned* . . . *The Minuteness* of the Interest won't relax the Objection, For the *Degree* of Influence can't be measured: No line can be drawn, but that of a total exclusion of *all* Degrees whatsoever." *Hesketh* v. *Braddock*, 3 Burrows 1847, 1855 (1766) (Emphasis in Original)

A fortiori the same standard applies to judges and quasi-judicial officials.

where there is the 'slightest pecuniary interest' on the part of the judge, and specifically rejected the State's contention that the compensation involved there [$12] was 'so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty . . .' " *Commonwealth Coatings Corporation* v. *Continental Casualty Company*, 393 U.S. 145, 148, *rehearing denied*, 393 U.S. 1112 (1968).

Whether viewed under the *Tumey* standard for substantiality of interest, or under a more strict scrutiny in the spirit of both the framers of the Constitution and the modern federal policy reflecting concern for the appearance of propriety in government, Judge Gasch's finding that the potential for bias in section 16(e) proceedings is substantially supported by the law and the facts.

III. THE DOCTRINE OF DISQUALIFICATION FOR INTEREST WAS CORRECTLY APPLIED BY THE COURT BELOW TO THE ADMINISTRATIVE PROCESS AT ISSUE

Section 16(e) mandates that sums collected as civil money penalties for child labor violations shall be used to reimburse the bureau, service, office, division, or other agency of the Department of Labor which supervised the work for the cost of determining the violations and assessing and collecting such penalties. The language of section 16(e) creates an impermissible risk of bias on the part of the Assistant Regional Administrators who determine the amount of the penalties within broad discretionary parameters; on the part of the Administrative Law Judges who make the final determination of the occurrence of the violations in contested cases; and on the part of other officials involved in the overall supervision of the Department's child labor penalty activities. Jerrico

maintains that the district court properly applied the standards of due process in finding that the biasing influence created by section 16(e) is a violation of the fifth amendment. It should be noted that the appellant carries the burden of convincing this Court that the hearing before the district court was either inadequate or that the legal conclusions deduced from the facts were erroneous. *See, Gardner* v. *California*, 393 U.S. 367, 370 (1969).

A. The Discretionary Authority Of The Assistant Regional Administrator, When Coupled With The Pecuniary Interest Created By Section 16(e), Violates The Standards Of Due Process

The Solicitor General argues that the Assistant Regional Administrator performs a prosecutive function totally devoid of judicial or quasi-judicial responsibilities; and, therefore, the due process standards established by this Court in *Tumey* v. *Ohio*, 273 U.S. 510 (1927), and *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972), are not applicable. Brief for Appellants, 13. This argument is incorrect on both legal and factual bases. Assistant Regional Administrators have a wide range of discretion in determining the amount of penalties to be assessed up to the $1,000 maximum per violation provided by statute. Among other things, the Assistant Regional Administrator is to take into consideration the appropriateness of such a penalty to the gravity of the violation; any history of prior violations; any evidence of willfulness or failure to take reasonable precautions to avoid violations; and the size of the business. 29 C.F.R. 579.5(c). This discretionary penalty-setting authority of the Assistant Regional Administrator, which is largely unreviewable by an Administrative Law

Judge, (see *infra* at 46-49) injects at the very least *quasi-judicial* authority into this role. The acts of an officer which are administrative in their character and which call for the exercise of that officer's judgment and descretion are not ministerial acts and his authority to perform such acts is quasi-judicial. *See, American Casualty Ins. Co. v. Fyler,* 60 Conn. 448, 22 A. 494 (1891). The role of the Assistant Regional Administrator is to be contrasted with that of a prosecutor. A prosecutor does not set the penalty for a contested or uncontested charge, but rather recommends a penalty which is approved, modified or disapproved after review in the courts. If the Assistant Regional Administrator's responsibility was limited to an investigation as to whether the violations had occurred, with a determination as to the amount of the penalty to be made by an impartial judge, the Administrator's role could be likened to that of a prosecutor. However, this was not the fact in the instant case. Section 16(e) provides that the determination of the Administrator is final unless the person charged with the violation takes exception within fifteen days after receipt of notice thereof. This authority to set a conclusive penalty rather than to propose a penalty to be sought is a further indication that his authority is judicial in nature rather than prosecutive.

The significance of the Assistant Regional Administrator's judgment becomes evident when it is noted that his decision becomes final absent an exception within fifteen days after notice thereof. His discretion, at a minimum, places a great burden on the alleged violator to come forward and re-litigate the issues before an Administrative Law Judge. With the potential for significant cost reimbursement from assessed penalties and the limited

scope of review by an Administrative Law Judge, the Assistant Regional Administrator can expect few alleged violators to appeal his ruling; and, those appealed to be infrequently overturned in their entirety. Given this authority, it is not necessary, nor even helpful, to attempt to make a semantic distinction between the titles of prosecutor or adjudicator; the authority remains the same.

The Solicitor General cites *Withrow* v. *Larkin,* 421 U.S. 35 (1975) to support the proposition that government attorneys may have at least some degree of interest in the success of their cases. In *Withrow,* this Court held that there was no risk of bias in a situation where the same administrative agency had both investigated and adjudicated the same issues. *Withrow* holds that the simple combination of investigative and adjudicative functions in the same agency is not, without more, a violation of the due process standards. *Withrow* is distinguishable from this case because the "something more" needed to create an impermissible risk of bias, that did not exist in *Withrow,* does exist here. In this case the Assistant Regional Administrator, not the agency of which he is a part, had both investigatory and adjudicatory functions and he had an expectation of and was in fact reimbursed for those investigatory and adjudicatory functions.

Any Assistant Regional Administrator reading section 16(e) would have an expectation of reimbursement for his office. It is not necessary, as the Solicitor General contends, for the Assistant Regional Administrator to take part in the budgetary process (even though he certainly has input in budget developments and expenditures), because the reimbursement of his office through allocated child labor

civil penalty funds is totally outside of the budget authorized by Congress and the distribution of such funds is made in addition to the normal budget allocations. Moreover, these funds may be expended for the office's ordinary expenses "notwithstanding any other provision of law." 29 U.S.C. 9(a). Expectation of reimbursement is evidenced by the participation of the Assistant Regional Administrator of the Atlanta region, who assessed child labor penalties against Jerrico, in a conference of the Department of Labor Employment Standards Administration's officials which was subsequently recorded as follows:

> " 'ACTION ITEMS DEVELOPED AT WAGE AND HOUR AREA CONFERENCE, WILLIAMSBURG, VA (DECEMBER 15 - 17, 1976)'
>
> '4. *Prepare formula for allocation* of major portion of CL-CMP's (Child Labor-Civil Money Penalties) collected to the regions for furtherance of CL compliance efforts.' "
>
> App. 44, Defendants' Answer to Plaintiff's Interrogatory No. 7 at Exhibit D (Emphasis Added)

This "Action Item" also evidences the budgetary role of the Assistant Regional Administrator, which was not adequately addressed in the government's pleadings, discussed *supra* at 33-35.

Further evidence of the expectation of reimbursement is found in the facts herein. The Assistant Regional

Administrator in Atlanta assessed civil money penalties against appellee in excess of $100,000, which was nearly the maximum that could be imposed under the statute. J.S. App. at 8a-9a. In fiscal year 1977, the year following the initial imposition of penalties in this case, the regional office in Atlanta was allotted $39,200 as its pro rata share of total penalties received. *Ibid.*

The above facts indicate that section 16(e), as read and as applied, gives the Assistant Regional Administrator a natural expectation of reimbursement for his office based on the expense his office has incurred in determining child labor violations and assessing and collecting such penalties. When this expectation of reimbursement is coupled with the wide range of discretion exercised by the Assistant Regional Administrator, the appearance of and potential for bias are unquestionably present. It is the combination of discretion in assessing penalty amounts, unreviewable except on the narrow issue of whether the violation occurred, (discussed *infra* at 46-49.) coupled with the substantial financial incentive of the Assistant Regional Administrator to maximize penalties, which results in a significant violation of due process. As Judge Gasch correctly found in his decision below:

> "Since civil money penalties are assessed in the first instance by regional officials whose office is subsequently allotted a portion of penalties received, plaintiff in this case did not receive in the first instance access to a 'neutral and detached judge.' "
> J.S. App., 11a.

B. Description Of The Review By The Administrative Law Judge As *De Novo* Is Inaccurate

The Solicitor General contends in his argument that the decision of the Assistant Regional Administrator is not final because the person charged with the violation has the option to contest the notice of penalty and receive a *de novo* review by an Administrative Law Judge. Brief for Appellants, 18. The classification of this hearing by an Administrative Law Judge as a *"de novo"* review is inaccurate. The Solicitor General states that in the event that a person charged with the violation takes exception to the assessment, " . . . the existence of the violation and the amount of the penalty are determined *de novo* by an administrative law judge . . . " Brief for Appellants, 18. This statement would lead one to believe that determinations by the Assistant Regional Administrator of (1) the occurrence of the violation and (2) the reasonableness of the penalty, can be determined by the Administrative Law Judge separately and independently on the basis of all the evidence.

However, this is not the case. A person charged with a violation of the child labor laws may take exception *only* to the determination that the violation actually occurred. If the occurrence of the violation is not contested, the Office of Administrative Law Judges is not empowered to determine the reasonableness of the penalty or hear any mitigating evidence from an alleged violator. Therefore, a totally unreasonable penalty assessed contrary to the evidence and the standards contained in section 16(e) is final and unalterable unless the alleged violator contests "the occurrence of the violation" or reaches some settlement

with the involved Labor Department officials out of fear that a fair or complete hearing is not possible before a neutral and detached judge. The regulations set forth the procedure for taking an exception to a notice of penalty. The relevant regulation reads as follows:

> "An exception to the determination that the child labor violation or violations, for which the penalty is imposed, occurred may be filed within 15 days after receipt of the notice of penalty by the person so charged."
> 29 C.F.R. 579.6(a)

Furthermore, the language used in the *Notice of Penalty* correspondence that is sent to persons charged with violations of the child labor laws tracks the language of 29 C.F.R. 579.6(a) almost word for word. A reading of the *Notice of Penalty* letter indicates to an alleged violator that one may dispute only the factual occurrence of the violation, with no recourse for a dispute as to the reasonableness of the penalty.

Moreover, this contention argued by the Solicitor General's office that *de novo* review exists at the Administrative Law Judge level is in direct conflict with what the Department of Labor argued on this issue in their brief at the administrative level of this case. The Department of Labor addressed this issue in the following manner:

> "The exception permitted by section 16(e) is *expressly limited to whether the violations for which the penalty is imposed actually occurred.* This defines the scope of the matter to be heard by the ALJ (Administrative Law Judge) and he cannot consider matters outside that scope."

Brief For The Secretary of Labor - Post Hearing, And In Support of Proposed Decision And Orders at 32 (Emphasis Added)

The thrust of the Department of Labor's argument gives credence to the proposition that when a person charged with a violation takes exception to the notice of penalty as per 29 C.F.R. 579.6(a), he is receiving at best an incomplete appellate review from the assigned Administrative Law Judge. The Solicitor General's characterization of the procedure as a *de novo* hearing and the Department of Labor's view of the procedure as narrow appellate review expressly limited to the question of the factual occurrence of the violation, could not be in more direct conflict.[17]

---

[17]*In re Ray Marshall* v. *Sambo's Restaurants, Inc.*, Opinion of *William A. Pope II*, Administrative Law Judge, Case No. 79-CL-547, dated September 7, 1979, Washington, D.C. In his Order Granting Summary Judgment to the Department of Labor ALJ Pope indicates the opinion of Administrative Law Judges as to their scope of review in cases involving child labor violations. Judge Pope states:

> ". . .the regulations implementing the Act quite clearly state that the Secretary's determination of the amount of the penalty is final, unless respondent first contests the occurrence of alleged violations by filing an exception within the required time. . . . Neither this section of the regulations [579.4 (c)] nor any other section authorizes the filing of an exception to the appropriateness of the penalty as a means of obtaining a hearing and final determination of the penalty by an administrative law judge."

Judge Pope granted the Department of Labor's Motion for Summary Judgment because, in his opinion, the letter of exception filed by respondents did not constitute an exception to the "existence of the violations;" rather it argued, for various mitigating reasons that the penalty was not appropriate. For this reason the letter did not constitute an exception within the meaning of the regulations and, "therefore, the Secretary's determination of the amount of the penalty must be deemed final. Section 579.4(b)"

The Solicitor General states that the authority exercised by the Assistant Regional Administrator under section 16(e) is "essentially identical" to that of the Secretary of Labor under section 10(a) of the Occupational Safety and Health Act, 29 U.S.C. 659(a). Brief for Appellants at 17, n. 12. A reading of the language of section 10(a) indicates that the authority granted to the Assistant Regional Administrator and its finality under section 16(e) is far greater than that which is granted to the Secretary under section 10(a) of the Occupational Safety and Health Act.[18] The fact that a person charged with a violation is not permitted to take exception to the amount of the penalty assessed, but only to the occurrence of the violation, has two significant results. First, it re-emphasizes the significance and the finality of the discretionary authority exercised by the Assistant Regional Administrator in determining the amount of penalties to be assessed. Second, it discredits the Solicitor General's contention that the Administrative Law Judge affords *de novo* review to an alleged violator, since *de novo* review can hardly be said to exist where the Administrative Law Judge must accept the Assistant Regional Administrator's determination as to the amount of penalty, and can only reduce the total amount of penalties assessed by finding that a particular violation or violations did not, in fact, occur. This further discredits the Solicitor General's Claim that the Assistant Regional Administrator's role is analogous to that of a prosecutor (discussed *supra* at 41-45).

---

[18]The relevant portion of section 10(a) reads as follows: "(i)f, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to *contest the citation or proposed assessment of penalty*. . ." Section 10(a), 29 U.S.C. 659(a) (Emphasis Added) In contrast, section 16(e) permits an exception only to the fact that the violations occurred.

C. Appearance Of Bias And Potential For Bias Exists At The Administrative Law Judge Level

The second major contention of the Solicitor General regarding the applicability of the due process standards deals with the way in which they apply to the Administrative Law Judge. The Solicitor General states that, "The district court recognized that there are no 'due process infirmities in child labor proceedings before the administrative law judge [in contested cases]'." Brief for Appellants, 18. Not only is this a misinterpretation of the district court's decision, it is a distortion of the actual language used by Judge Gasch in his opinion. Judge Gasch did not reach a conclusion on this issue at all. Instead, he found that because of the inherent unfairness that existed at the level of assessment, a later review could not correct the original bias. J.S. App., 10a.

Judge Gasch did not even venture into a analysis of the issue of bias at the Administrative Law Judge level, except to restate the Department of Labor's contentions. He then went on to say that a party "is entitled to a neutral and detached judge in the first instance" (citing *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972)), J.S. App., 10a, and "plaintiff in this case did not receive in the first instance access to a 'neutral and detached judge.' " J.S. App., 11a.

This Court has firmly established the proposition that unfairness at the trial level cannot be corrected through the existence of an appeals process. *Ward, supra*, 61. However, in the event that this Court finds that no bias existed at the level of assessment by the Assistant Regional Administrator, there is evidence to support the contention that the potential for and the appearance of bias exists at the Administrative Law Judge level.

The language of section 16(e) provides for reimbursement in the following manner:

> "Sums collected as penalties pursuant to this section *shall be applied* toward reimbursement of the costs of determining the violations and assessing and collecting such penalties, in accordance with [29 U.S.C. 9(a)]".
> (Emphasis Added)

The language of 29 U.S.C. 9(a) referred to in section 16(e) states:

> "All moneys hereinafter received by the Department of Labor in payment of the cost of such work *shall be deposited* to the credit of the appropriation of that bureau, service, office, division, or other agency of the Department of Labor which supervised such work, and *may be used in the discretion of the Secretary of Labor, and notwithstanding any other provision of law, for the ordinary expenses of such agency* and/or to secure the special services of persons who are neither officers nor employees of the United States."
> (Emphasis Added)

The Office of Administrative Law Judges is unquestionably an "office" of the Department of Labor, as used in the context of the language of section 9(a). Furthermore, the Office of Administrative Law Judges, certainly takes part in the "determination" of the violation,

as used in the context of section 9(a), in that the Administrative Law Judge determines if the violation did in fact occur. The fact that the penalties in the instant case were not actually used to reimburse the Office of Administrative Law Judges is immaterial. Unless this Court affirms the unconstitutionality of section 16(e), penalties collected in the future can and must be used to reimburse such costs. Surely the standards of due process as set forth in *Tumey* and *Ward* are to be applied to administrative adjudication. This Court expressed support for this principle in its decision in *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973), in stating "[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators. K. Davis, Administrative Law Text 12.04, p. 250 (1972)."

IV. SEVERANCE OF THE REIMBURSEMENT PROVISION OF SECTION 16(e) IS NOT APPROPRIATE

If the reimbursement provision of section 16(e) is found unconstitutional, then the entire section must be declared invalid. The Solicitor General addresses the severability issue and in so doing quotes the following rule:

> "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped *if what is left is fully operative as law.*"
> *Champlin Refining Company* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932). Accord, *Buckley* v. *Valeo*, 424 U.S. 1, 108-109 (1976); *United States* v. *Jackson*, 390 U.S. 570, 585 (1968). Brief For Appellants, 33. (Emphasis Added)

This is unquestionably an accurate statement of the law. However, Jerrico maintains that this is the precise rule of law on which to base a decision holding that the reimbursement provision of section 16(e) is not severable from the remaining portion of the section. The operative language of this rule of construction is that part which reads, " . . . the invalid part may be dropped if what is left is fully operative as a law." The consistent theme, found throughout all of the cases supporting this rule of severability, is that the part to be severed and the remaining portion to be left intact must be independent of each other. Severance of the reimbursement portion of section 16(e) is not appropriate because the remaining portion of section 16(e) is dependent upon the reimbursement provision to direct the disposition of the civil money penalty funds.

The Solicitor General quotes the district court's opinion wherein Judge Gasch recognizes that it would be "simple and constitutionally sound [for] all civil money penalty funds [to be paid] directly into the Treasury of the United States." Brief For Appellants, 33. The Solicitor General goes on to state that this is the result that would obtain if severance were effected. *Ibid.* However, notwithstanding the Solicitor General's statement, there is nothing to suggest that this is what would necessarily result.[19] If the reimbursement clause of section 16(e) was

[19]Affidavit of Assistant Administrator Wage and Hour Division, ESA, U.S. Department of Labor, filed with appellants' Motion to Stay on May 17, 1979, indicates only that all monies collected on and after May 7, 1979, pursuant to section 16(e) are to held in *escrow* and deposited in an account with the United States Treasury until final judicial determination and resolution of the legal issues in the instant case.

severed, it is unclear where the civil money penalty funds would go.

Moreover, nothing but speculation can be offered as to what Congress might have intended as to an alternative disposition of the funds. Congress expressly provided for disbursement of the funds in the reimbursement provision of section 16(e). The Solicitor General's request that the Court presume that Congress would have wanted the funds to go directly into the Treasury of the United States is in direct conflict with the express intent of Congress. Certainly it is conceivable that Congress would prefer to earmark the funds for other lawful purposes related to the problems of child labor. Furthermore, a decision by the Court expressly mandating that the funds be paid directly into the Treasury, would not only contravene Congressional intent, but would, in effect, constitute impermissible judicial intervention in the legislative process.

The Solicitor General references the general severability clause of the Fair Labor Standards Act as evidence of Congressional intent to preserve any constitutional portion of the Act whenever possible. Brief For Appellants, 34. While this may demonstrate general Congressional intent, this simply is not an instance where severance is possible. Even the general severability clause is subject to the rule that whenever severance is to be carried out, the remaining portion of the statute must be "fully operative as a law." As discussed earlier, the remaining portion of section 16(e) would provide only for collection of civil money penalty funds without any direction as to their disposition.

Jerrico maintains that if the reimbursement provision is declared unconstitutional, the entire section should be declared invalid, properly reserving to Congress the power and discretion to promulgate a new civil money penalty provision providing for lawful disposition of the civil money penalty funds. Pending Congressional action, the Department of Labor would not be left without appropriate judicial remedies for enforcement of the child labor laws. The Department of Labor could pursue remedies through the injunctive and criminal sanctions that are provided for in sections 16(a) and 17 of the Fair Labor Standards Act.

The biasing nature of section 16(e) is intrinsic in the language of the section, having a potential effect on anyone who would read the statute. Even if this Court were to sever the provisions of section 16(e) relating to penalty reimbursement, allowing the remainder of the section to be enforced, the biasing influence of the statutory language would still affect all who read the section. Only actual notice of this Court's decision to sever and declare the reimbursement provision unconstitutional to each and every Department of Labor official affected by the provisions of section 16(e) could eliminate the impermissible potential for bias inherent in section 16(e). Appellee submits that judicial severance cannot achieve this result. Furthermore, the appearance of bias created by section 16(e) remaining in official and unofficial texts of the Act will not be cured by judicial severance. In this instance the Court should take notice of Mr. Justice Frankfurters's admonition, "Justice must satisfy the appearance of justice." *Offutt* v. *United States,* 348 U.S. 11, 14 (1954). Jerrico maintains that the only method by which to correct the bias, the potential for bias, and the appearance of bias

inherent in section 16(e) is for this Court to declare the whole of section 16(e) invalid, thus affording the Congress the opportunity to promulgate a new child labor civil money penalty statute expressly providing for a lawful disposition of the funds.

Assuming *arguendo* that the Court finds severance to be an appropriate remedy, Jerrico maintains that the injunction issued by the district court should remain in full force and effect. Payment of penalties already assessed or collected into the Treasury of the United States would do nothing to correct the bias, the potential for bias, and the appearance of bias in the procedure as found by the district court in this assessment. It would be grossly inequitable for this Court to uphold the unconstitutionality of the reimbursement provision but then to order appellee to pay civil money penalties that were determined and assessed in violation of due process.

This Court should apply the general principle of statutory construction regarding prospective versus retroactive operation. When a statute determines the substantive rights of an individual or a group of individuals, it should be given prospective application only.[20]

If this Court affirms the decision of the district court that section 16(e) is an unconstitutional violation of due process, then regardless of its decision on the severability issue, appellees' civil money penalty liability was determined pursuant to an unconstitutional procedure and is therefore invalid.

---

[20] *See, Haggar Co.* v. *Helvering*, 308 U.S. 389 (1942), *Hassett* v. *Welch*, 303 U.S. 303 (1938).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

THOMAS W. POWER
ROBERT D. McDONALD
Counsel for Jerrico, Inc.

WILLIAM E. ANDERSON
CURTIS L. WILSON
Of Counsel

February 1980